APPEAL NO. 051824
FILED SEPTEMBER 19, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on July 19, 2005. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 15% as assessed by the designated doctor whose report was not contrary to the great weight of the other medical evidence.

The appellant (self-insured) appeals, contending that the great weight of other medical evidence is contrary to the designated doctor because there was insufficient verification to justify the 15% IR. The file does not contain a response from the claimant.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable (cervical) injury on _____, that (Dr. E) was the designated doctor and that the claimant reached maximum medical improvement (MMI) on February 27, 2004.

A magnetic resonance imaging (MRI) of the cervical spine was performed on May 23, 2003, it showed some "mild posterior herniations" but "no central canal stenosis or remarkable foraminal narrowing." Another doctor in a "History and Physical & EMG Summary" of a visit on June 24, 2003, has an impression of "mild-to-moderate right side greater than the left C3-C4 cervical radiculopathy." The designated doctor examined the claimant on February 27, 2004, and in a report certified MMI on that date and assessed a 15% IR based on DRE Cervicothoracic Category III: Radiculopathy under the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) citing the "EMG performed on 06-24-2003" and the MRI. The treating doctor in a report dated December 14, 2004, also assessed a 15% IR based on DRE Cervicothoracic Category III: Radiculopathy.

(Dr. H) in a peer review report dated April 5, 2004, questioned whether the claimant "had any significant and true objective signs of radiculopathy" noting that the claimant's "reflexes in her upper extremities were found to be normal" and that she did not have any significant atrophy in the upper arms. Dr. H questioned how a physician could "determine muscle weakness if both sides are identical." Dr. H's report was sent to the Texas Department of Insurance Division of Workers' Compensation (Division) requesting clarification. The Division by letter dated April 15, 2004, requested clarification from the designated doctor. In an undated response referring to a Division "letter dated April 14, 2004," Dr. E stated:

> At the time of my examination the claimant had decreased muscle testing in both the right and left sides as well as slight (1.5 cm) atrophy of the more affected extremity (per EMG studies on 06-24-2003). I feel the appropriate impairment rating according to the AMA Guides 4th edition is a DRE III for cervical radiculopathy, I have no changes to make to my original assessment at this time.

Subsequently, Dr. H examined the claimant on June 14, 2004, and in a report of that date agreed with Dr E's MMI date but "found no significant signs of any radiculopathy" (emphasis in the original). Dr. H referenced the MRI (of May 23, 2003), and commented that the 1.5 cm "atrophy" found by Dr. E is "insufficient to satisfy the AMA Guides requirements." Dr. H assessed a 5% IR based on DRE Cervicothoracic Category II: Minor Impairment. The Division again requested clarification by letter dated February 25, 2005, from the designated doctor specifically asking:

> 1. Enclosed is a copy of a report from [Dr. H] in which he states that the AMA Guides require a finding of 2 cm of atrophy in order to be considered for a rating for radiculopathy. Please give us your opinion of whether the finding of 1.5 cm of atrophy meets the requirements of the AMA Guides. Does this change the impairment rating assessed for [the claimant]?
>
> 2. You state that you found bilateral muscle weakness during your evaluation. If both sides tested equally how can you find that there is muscle weakness of either side?
>
> 3. Does it remain your opinion that the impairment rating is 15%? If no please submit an amended Report of Medical Evaluation (TWCC-69) with your response.

In an undated response, Dr. E replied:

> After review of the information submitted, I have no changes to make to my original assessment. Muscle atrophy found correlates with the amount of this diagnosis with radiculopathy.

The hearing officer found that the "designated doctor's reports taken together are substantially in compliance with the requirements of the appropriate version of the Guides."

Page 3/104 of the AMA Guides, DRE Cervicothoracic Category III: Radiculopathy has the following description and verification:

> Description and Verification: The patient has significant signs of radiculopathy, such as (1) loss of relevant reflexes or (2) unilateral atrophy with greater than a 2-cm decrease in circumference compared with the

> unaffected side, measured at the same distance above or below the elbow. The neurologic impairment may be verified by electrodiagnostic or other criteria (differentiators 2, 3, and 4, Table 71, p. 109).

The differentiators in Table 71, page 109 include loss of reflexes as verified by "[u]neqivocal electrodiagnostic evidence exists of acute nerve root compromise" and atrophy of 2 cm or more above or below the elbow or knee. The only evidence of any atrophy is in Dr. E's first letter of clarification where she references "decreased muscle testing in both the right and left sides as well as slight (1.5 cm) atrophy of the more affected extremity" referring to EMG studies of June 24, 2003, which had the impression of "mild-to-moderate right side greater than left C3-C4 radiculopathy." Appeals Panel Decision (APD) 050729-s, decided May 23, 2005, and APD 051456, decided August 16, 2005, both reference APD 030091-s, decided March 5, 2003 which states:

> However, the AMA Guides indicate that to find radiculopathy, doctors must look to see if there is a loss of relevant reflexes or unilateral atrophy with greater than a two centimeter decrease in circumference compared with the unaffected side, measured at the same distance above or below the elbow. The AMA Guides state that such findings of neurologic impairment may then be verified by electrodiagnostic studies. The AMA Guides do not state that electrodiagnostic studies showing nerve root irritation, without any loss of reflexes or atrophy, constitutes undeniable evidence of radiculopathy.

Setting aside the adequacy of the designated doctor's second letter of clarification, there is simply insufficient evidence of loss of relevant reflexes or unilateral atrophy with greater than a 2-cm decrease in circumference to meet the requirements of the AMA Guides. The hearing officer apparently finds that 1.5 cm atrophy is "substantially in compliance" with the AMA Guides. We disagree in that this would begin a slippery slope of what is substantially in compliance with the AMA Guides and what is not. In this case there is insufficient evidence of verification of radiculopathy to warrant a rating under DRE Cervicothoracic Category III: Radiculopathy.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that, if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. Rule 130.6(i) provides that the designated doctor's response to a Division request for clarification is considered to have presumptive weight as it is part of the doctor's opinion. We hold that Dr. E's assessment of a 15% IR based on DRE Cervicothoracic Category III: Radiculopathy is contrary to the great weight of the other medical evidence because it does not comply with the AMA Guides on verifying the rating for radiculopathy. However, Dr. H's report of June 14, 2004, assessing a 5% IR based on DRE Cervicothoracic Category II: Minor Impairment is supported by the evidence and is not contrary to the great weight of the other medical evidence.

Accordingly we reverse the hearing officer's determination that the claimant's IR is 15% and render a new decision that the claimant's IR is 5% as certified by Dr. H.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

NAME
ADDRESS
CITY, TEXAS ZIP CODE.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Margaret L. Turner
Appeals Judge